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Legal Ethics Is About the Law, Not Morality or Justice: A Reply to Critics

W. Bradley Wendel*

In Martin Scorsese's concert film *Shine A Light*, guitarist Jack White joins the Rolling Stones on stage for one song.¹ As he is playing and singing, he keeps stealing glances at Mick Jagger and is unable to stop grinning like an idiot. It is obvious to any viewer what he is thinking in that moment: "Holy s---, I'm playing *with the Rolling Stones!*" I know exactly how he feels, since the legal ethics equivalent of the Rolling Stones have been gracious enough to invite me onto the stage with them. Like Jack White growing up listening to Keith Richards, I have been reading and learning from the scholars in this Colloquy for as long as I can remember—maybe copping a few licks while trying to find my own distinctive sound, but always conscious of the pioneering work of my predecessors. Not only do I admire the work of my reviewers enormously, but I am deeply grateful for the sympathetic mindset with which they approached the book. Reading through the reviews, I frequently found myself saying, "Yes, that's exactly the point." Engaged critics make disagreement an even more urgent matter for an author, as there is no way to write off such criticism as the result of misunderstanding or as attacking a straw version of the position in the book. As a result, I fear that I have not done justice to all of the points raised in these reviews. In some instances, the book has to speak for itself.² In other cases, a satisfactory response to a challenging point raised in one of these reviews would require a separate essay, well beyond the space constraints of this brief response. I am hopeful that the reviews are only the beginning of a debate about the book, because I have a lot more to say!

I. Indeterminacy

All of the reviewers express, in one form or another, the concern that law cannot perform the function assigned to it in my theory. They accurately summarize the argument that the law supersedes societal controversy and provides a moderately stable, provisional framework for cooperation,

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1. *SHINE A LIGHT* (Paramount Classics 2008).

2. For example, Pepper and Simon object strongly to my take on the case of Daniel Bibb, the prosecutor in the Manhattan District Attorney's office who allegedly contrived with defense lawyers to scuttle the retrial of two defendants whom Bibb believed were innocent. Stephen L. Pepper, *The Lawyer Knows More than the Law*, 90 TEXAS L. REV. 691, 696 (2012) (book review); William H. Simon, *Authoritarian Legal Ethics: Bradley Wendel and the Positivist Turn*, 90 TEXAS L. REV. 709, 711–12 (2012) (book review). Maybe readers will remain unpersuaded, but I really do not think I can improve on the arguments in the book.

notwithstanding normative and empirical disagreement. They worry, however, that the law is incapable of settling society-wide disagreement. If it is not, there would seem to be little reason to respect it. Kruse puts the objection quite clearly and powerfully: "If law lacks the capacity to settle deep and persistent normative controversy in society, then Wendel's functional argument for the legitimacy of law falls away."³ The problem is not that the process is random, like consulting a Magic 8-Ball, but that the law merely reproduces social disagreement in the guise of legal interpretation. Pepper appeals to what H.L.A. Hart refers to as the open texture of law.⁴ Hart notes that subsuming specific facts under instances of a general rule calls for the exercise of judgment, and no rule can determine its own application in advance.⁵ The law may also embody awkward compromises, have more than one purpose, or be such a hodgepodge that it is essentially purposeless.⁶ Kruse makes a similar point when she says, "[I]t is questionable that law has the capacity to settle moral controversy."⁷ Simon's objection is different. He does not so much assert the indeterminacy of law as rely on its determinacy and claim that I have gotten the legal analysis wrong because I assume a formalistic style of legal reasoning.⁸

3. Katherine R. Kruse, *Fidelity to Law and the Moral Pluralism Premise*, 90 TEXAS L. REV. 657, 663 (2012) (book review).

4. See H.L.A. HART, THE CONCEPT OF LAW 127–28 (2d ed. 1994) ("Whichever device, precedent or legislation, is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*.").

5. See *id.* at 130 ("We shall thus indeed succeed in settling in advance, but also in the dark, issues which can only reasonably be settled when they arise and are identified."). Pepper's criticism is clearly indebted to Hart:

As enacted, a legal provision is a generality The lawyer, however, is present at a specific potential application of that legal provision. . . . A legal provision's moral or policy compromise is up in the air, general, and abstract; lawyer and client are down on the ground where the law's effect will be concrete and specific.

Pepper, *supra* note 2, at 693.

6. See, e.g., Pepper, *supra* note 2, at 693 (arguing that laws are enacted as general rules of thumb to achieve certain moral or policy purposes but that their real-world application is often more nuanced or complex).

7. Kruse, *supra* note 3, at 658.

8. Simon relies on Dworkin's argument in *Model of Rules I* that positivism cannot account for the role that principles play in legal reasoning. See Simon, *supra* note 2, at 712–13 ("Dworkin, in rejecting the positivist 'Model of Rules,' insisted that the role of principles and policies in the legal system precluded any strong separation."); RONALD DWORKIN, *The Model of Rules I*, in TAKING RIGHTS SERIOUSLY 14 (1978). Dworkin's critique of positivism is that it features an implausible model of adjudication, in which a judge's decision is either determined by applicable rules or left to the standardless exercise of discretion. DWORKIN, *supra*, at 34–35. What we call legal judgment, according to Dworkin, is better understood as the balancing of rules against principles of political morality; these principles do not dictate results but "incline a decision one way, though not conclusively." *Id.* at 35. In places, however, Simon ascribes to Dworkin an implausible view about the scope of principles. For example, he says that impeaching a witness known to be telling the truth by introducing evidence of the witness's prior criminal conviction would violate the principle that parties should not mislead the trier of fact. Simon, *supra* note 2, at 713. Not only does this

Despite differences in detail, the critics' objections come down to this: The law does not provide some fixed point of reference but can be adapted by clever lawyers to their clients' needs. Rather than replacing client interests with legal entitlements, lawyers just obscure the rent-seeking process with a rhetorical façade. In the book, I quoted King Louis XII of France, who supposedly complained that "[l]awyers use the law as shoemakers use leather; rubbing it, pressing it, stretching it with their teeth, all to the end of making it fit their purposes."⁹ If lawyers really do have this power of pressing the law into whatever shape best fits their clients' purposes, the law cannot provide a framework for social cooperation that transcends disagreement. Not surprisingly, I do not accept the shoe-leather criticism, as stated by King Louis or by my critics here. The problem in a short response like this one is to demonstrate how law can be relatively stable and determinate. Since I cannot reargue the book in a few pages, I will only suggest that legal scholars should pay more attention to what lawyers actually do, as opposed to arguing about abstractions.

For example, I have written extensively about the legal advice given during the Bush Administration Department of Justice (DOJ) lawyers who concluded that domestic and international law prohibiting torture did not prohibit interrogation techniques amounting to torture, when performed by American interrogators as part of the so-called war on terror.¹⁰ My response was that the lawyers had failed in ethical terms *as lawyers*, not because torture is terrible in ordinary moral terms (although it is), but because the legal advice given reflects an attitude of contempt, or at least indifference, toward the law. Recently, it has been reported that DOJ lawyers in the Obama Administration have prepared a still-secret memo authorizing the President to kill American citizens abroad without a trial, as long as the President certifies that they were taking part in hostilities between al Qaeda and the United

reasoning elide the client's legal entitlement to put the state to its proof, but it relies on a principle that is too abstractly stated. Legal principles are different from moral principles in that they gain content and force only as instantiated as legal reasons. In the impeachment example, the principle that one should not mislead the trier of fact is instantiated in fairly specific rules with clearly defined triggering conditions and exceptions. The clearest illustration is the prohibition on presenting false evidence, including the testimony of clients and nonclient witnesses. MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (2009). The prohibition applies only when the lawyer knows the evidence to be introduced is false, with *knowledge* defined as "actual knowledge." *Id.* R. 1.0(f), R. 3.3 cmt. 8. Moreover, the lawyer should first attempt to dissuade the client from committing perjury, and if that fails she should seek the guidance of the court, which may order the lawyer to proceed with normal questioning of the witness or may permit the lawyer to put on the testimony in a narrative format. *Id.* R. 3.3 cmt. 7. I am not denying the existence of principles or their role in legal reasoning, but it is important that lawyers rely on reasons internal to the law, not free-floating moral ideals that, whatever their attractiveness, are not part of the law.

9. W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* 69 (2010).

10. See generally W. Bradley Wendel, *Executive Branch Lawyers in a Time of Terror: The 2008 F.W. Wickwire Memorial Lecture*, 31 DALHOUSIE L.J. 247 (2008); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67 (2005); W. Bradley Wendel, *The Torture Memos and the Demands of Legality*, 12 LEGAL ETHICS 107 (2009) (book review). The torture memos are discussed in the book in Section 6.1. WENDEL, *supra* note 9, at 177–84.

States and it is impossible or impracticable to capture them alive.¹¹ The government relied on that advice to authorize the killing of Anwar al-Awlaki and his sixteen-year-old son. One of three things must be true about these recent killings and the legal advice given to the President: (1) the legal advice is a sound, faithful interpretation of governing law, and the Obama DOJ lawyers acted ethically while those in the Bush DOJ did not; (2) the legal advice is just as unsound as that contained in the torture memos prepared by the DOJ in the Bush administration and should be criticized in the same terms; or (3) there is no way to praise or blame either group of lawyers because the law is like shoe leather and can be formed into whatever shape is needed to satisfy the client's wishes. The legal analysis authorizing the killing of al-Awlaki and his son is still secret, so it has not been subjected to the extensive, critical scrutiny given to the Bush-era torture memos, but when the Obama administration memos finally surface, as they undoubtedly will, I expect conscientious lawyers who are experts in the relevant fields of law to debate whether the legal analysis is sound. For academic critics to assert the indeterminacy of law is essentially to abandon the ideal of legality and the norms of the very craft we purport to teach to our students. Strong indeterminacy claims have always struck me more as rhetorical posturing than serious jurisprudential arguments, although there are some sophisticated sociolegal accounts of the way clients actually experience and comply with law that deserve serious attention.¹² The only way to really refute an indeterminacy argument, however, is to get inside the practice of making and evaluating legal arguments.

II. Exclusion of Morality

Simon is correct to note that I distinguish my position from his, as well as from those of Luban and Deborah Rhode, in not seeing justice as the central normative touchstone for legal ethics.¹³ If the role of the lawyer is not to be understood in terms of justice, then what social good could it serve? Critics like Luban, who accuse the book of adopting a Panglossian stance on the legal system,¹⁴ are conflating my argument about the lawyer's role with a

11. See, e.g., Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, available at <http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html> (reporting on the killing of Anwar al-Awlaki by a drone-fired missile in Yemen); Glenn Greenwald, *The Killing of Awlaki's 16-Year-Old Son*, SALON (Oct. 20, 2011), http://www.salon.com/2011/10/20/the_killing_of_awlakis_16_year_old_son/singleton/ ("The Executive Branch decided it has the authority to target U.S. citizens for death It then concluded in a secret legal memo that Awlaki specifically could be killed, but refuses to disclose what it ruled or in which principles this ruling was grounded.").

12. I discuss Kruse's critique of this argument in Part III. See *infra* notes 34–43 and accompanying text.

13. Simon, *supra* note 2, at 710.

14. Part III of Luban's review is entitled "The Best of All Possible Legal Systems," an allusion to Voltaire's Dr. Pangloss who, in turn, was a satire of Leibniz's purported solution to the problem of evil. David Luban, *Misplaced Fidelity*, 90 TEXAS L. REV. 673, 679 (2012) (book review).

more general argument about the social value of the law. To be sure, the position I take on the lawyer's role depends on the social value of the law, but it is limited in an important way: The task of legal ethics is to understand what constitutes right and wrong conduct by lawyers. Right conduct may be, as I argue, exhibiting respect for the law in advising one's clients and in representing clients in litigation, and the reason this is right for lawyers may relate to the social goods sought to be secured by the law. This does not mean, however, that one can always conclude that the law represents a positive good for a particular client in a particular case. Luban rightly characterizes the problem of overcrowded prisons and conditions of confinement that may constitute torture as a matter of international law.¹⁵ It truly would be the height of smug complacency to address the prisoners in one of these torture-chamber prisons and tell them they should be grateful for the goods secured by the law.¹⁶ That stance would have the quality of bad theodicy, which confidently informs people that they should thank God for their suffering because God undoubtedly intends to use that suffering for good elsewhere in the world.¹⁷ But my argument is not that the law is always good for all people; rather, it is that if there is good to be found in law, the legal system, and the legal profession, it should be understood in a particular way. It is good that people have available to them a way of organizing society that manifests respect for one another as equals. This is not all there is to life, however, and it certainly should not be understood as crowding out other means of social interaction, problem solving, moral deliberation, and self-understanding.¹⁸

15. *Id.* at 681.

16. *Id.*

17. See, e.g., BART D. EHRLMAN, GOD'S PROBLEM: HOW THE BIBLE FAILS TO ANSWER OUR MOST IMPORTANT QUESTION—WHY WE SUFFER 8 (2008) (discussing various philosophical approaches to the problem of theodicy).

18. In an extremely interesting section of his review, Luban unpacks the word *fidelity* and charges me, in effect, with making a category mistake. Luban, *supra* note 14, at 681–86. Allegations of marital infidelity do not mean merely violating some abstract norm of devotion or loyalty; rather, they signify specifically going over to a rival, a transfer of allegiance, switching sides. *Id.* at 681–82. Betrayal of a friendship likewise means abandoning a person, either in favor of another or in favor of oneself. *Id.* at 682–83. Similarly, religious fidelity means refraining from idolatry or the worship of other gods. *Id.* at 683–84. In all of these cases, fidelity is something owed to another with whom one is in a direct personal relationship, unmediated by abstract duties or relationships constituted through institutions. *Id.* at 684–85. Luban and I are in complete agreement that the obligation, if any, to respect the law must derive from respect for the people in one's political community, and that disobedience (or, I might add, working around the law) is a form of free riding that expresses disdain for one's fellow citizens. *Id.* Because fidelity is a value associated with intimate relationships, however, fidelity-related duties are necessarily reciprocal, and a lack of faithfulness by one party can "snap[] the bonds of reciprocity." *Id.* at 685. When a person or group within a political community is abandoned or subjected to discrimination by the majority, it would be cruel to call upon these marginalized citizens to express fidelity to the law, because "the law"—in personal terms, the majority of members of the political community—has already been unfaithful. *Id.* It would be tantamount to forcing a betrayed spouse to remain in a marriage while the other spouse continues cheating. Luban thus inverts the image of faithfulness, constancy, and loyalty that I meant to invoke in the title of the book, turning it into a powerful

As Luban notes, however, the entire structure may be a bit fiddly if any morality is allowed to creep back into deliberation. The process through which people are able to transcend uncertainty and disagreement, by replacing first-order reasons for action with the second-order reasons given by the law, may unwind if lawyers frequently resort back to first-order reasons.¹⁹ This “resorting back” would occur if second-order reasons are not truly exclusionary but are only presumptive or weighty. Luban has relied on the idea of recourse roles,²⁰ under which, in some cases, the best way to remain faithful to the requirements of a role is to violate them. A role is constituted for some end or ends. In the great majority of cases, the way someone acting in a role will best accomplish those ends is to follow the directives of the role. There may be instances, however, in which the best way to achieve the ends of a role is to do something that is not permitted by the constitutive rules of the role. In order to make this determination, the occupant of a role must have recourse back to the ends of the role (hence the name *recourse role*).²¹ Recourse roles nicely capture the role-differentiated nature of obligations faced by many professionals without losing touch entirely with the broader social ends for which the professional role is constituted. As I have noted in a paper published after the book, recourse roles do not necessarily license wide-open moral deliberation; “rather, an agent has recourse only to certain considerations, such as the specific task the role is designed to accomplish.”²² It is actually Simon, not Luban, who should rely on the idea of recourse roles, because Simon’s overall argumentative strategy is to juxtapose what many would agree is the end of the lawyer’s role (legal justice) with the injustices that frequently result in particular cases. It seems less plausible to think that the end of the lawyer’s role is to do good in ordinary moral terms, although some philosophers have argued that law has authority only to the extent that it improves compliance with morality.²³ In my view, which I think is shared by most practitioners,

critique of injustice—“difference made legal” in the words of Martin Luther King Jr. *Id.* at 684–85. It is the case that I had interpretive fidelity in mind when I thought of the title of the book, but the dual meaning of the word does underscore the importance of fairness and reciprocity as the foundation of the obligation to respect the law. *See id.* at 685–86 (agreeing that interpretive fidelity can be an obligation of lawyers).

19. Luban, *supra* note 14, at 687 (“Wendel’s seemingly minor modification actually undermines the basic Razian architecture of separating multiple levels of reasons.”).

20. *See* MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* 15–36 (1973) (“[I]t is precisely to the concept of their [social] role that people turn when they want to understand what they can and cannot do.”). As Luban notes in his review, he relied on the structure of recourse roles in his reformulation of the position in *Lawyers and Justice*. *See* Luban, *supra* note 14, at 687 n.69 (citing David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-course Corrections to Lawyers and Justice*, 49 MD. L. REV. 424 (1990)).

21. KADISH & KADISH, *supra* note 20, at 21–22.

22. W. Bradley Wendel, *Three Concepts of Roles*, 48 SAN DIEGO L. REV. 547, 553 (2011).

23. *See, e.g.,* LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* 98–99 (2001) (observing that the most important element of

lawyers are not all-purpose agents who facilitate moral deliberation; rather, they are simultaneously representatives of clients and ministers of the law who help clients fit their conduct within the scheme of rights and duties created by the law.

Whether the end of the lawyer's role is taken to be justice or morality, recourse roles are vulnerable to the problem of pluralism. One of the principal arguments in the book, which none of the reviewers seems to disagree with, is that reasonable, conscientious people may disagree in good faith about what is required by morality or justice in a particular situation. As a result, there is a missing "who decides?" question embedded in the recourse strategy: Suppose a lawyer believes that asserting a client's legal entitlement, either as the basis for legal advice or in litigation, will result in either injustice (to use Simon's conception of the end of the role)²⁴ or an ordinary moral violation (Luban's conception).²⁵ Now suppose the client disagrees with the lawyer and insists that the lawyer take the lawful action that would vindicate the client's legal entitlement. Is it the lawyer's prerogative to decide whether to act directly on the end of the role? If so, then giving the lawyer this decision-making authority undercuts the agency nature of the lawyer-client relationship.²⁶ On the other hand, of course, the lawyer must worry about her own moral (not legal) agency. In the vast majority of cases in a basically just society, however, a lawyer can assume that she is not committing a moral wrong by helping clients order their affairs with respect to their legal entitlements. I do not deny the existence of injustice that

understanding a law is understanding what the moral authority that created the law intended the law to mean); Heidi M. Hurd, *Interpreting Authorities*, in *LAW AND INTERPRETATION* 405, 425 (Andrei Marmor ed., 1995) (arguing that the interpretation of laws must be based upon how well laws "conform our conduct to the demands of morality").

24. Simon, *supra* note 2, at 715–17.

25. Luban, *supra* note 14, at 676–78.

26. Pepper worries that an obligation of fidelity to law that is too strict will cause lawyers to lose sight of their obligation to serve clients. Pepper, *supra* note 2, at 696–97. His objection underscores the fiduciary nature of the attorney-client relationship, as elaborated in countless cases. See, e.g., *Maritrans GP Inc. v. Pepper*, Hamilton & Scheetz, 602 A.2d 1277, 1287–88 (Pa. 1992) (enforcing a preliminary injunction against attorneys who breached their fiduciary duty to their client). One reason Fried's lawyer-as-friend metaphor has had staying power is that it makes this relationship of trust and confidence central to the lawyer's ethical duties. But a lawyer is not *just* a fiduciary; a lawyer is a fiduciary with respect to the client's interests and the law. Lawyers have the privilege and the burden of representing their clients' interests, zealously, *within the bounds of the law*. A lawyer does not have a simple, straightforward fiduciary relationship with only one party; rather, the lawyer and the client are both encumbered by other duties—in this case, respect for the law—and those duties affect the way the lawyer must carry out her fiduciary obligations to the client. Cf. Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 *GEO. J. LEGAL ETHICS* 15, 31–32 (1987) ("The client in such a triangular situation is not a person alone—the A of classical legal hypotheticals, where 'A, the owner of Blackacre' does something to or is done something by B. One who has become another's guardian is no longer A but has become 'A encumbered by duties to B.'"). Picking up on this analysis, the lawyer in my conception of legal ethics is the representative of "the client encumbered by duties to the law" and also has her own directly owed duties to respect the law. The lawyer does not merely assist her client in acting but also in meeting the client's legal obligations while acting.

anyone would recognize as such, notwithstanding pervasive moral pluralism. Rather than try to design a system of legal ethics around those extreme cases, however, I wrote this book to account for the nature of the good that lawyers do—most of the time.²⁷

III. Exclusion of Politics

Luban, Kruse, Simon, and Alfieri charge me with being, in Luban's words, "[an apologist] for the status quo."²⁸ Law by itself may not have much to offer to impoverished, marginalized communities like West Grove, which is served admirably by Alfieri, his colleagues, and their students.²⁹ I also would not restrict a community organizer, activist, and lawyer to formalistic strategies and wooden obedience to law, and in fact, I would wholeheartedly endorse the multifaceted strategy of private fundraising, a media campaign, public protests, and political pressure to prevent the closure of libraries that are vitally important to the West Grove community.³⁰ As Simon rightly observes, "principled defiance of constituted authority is an honored tradition in American public life."³¹ I share Simon's admiration of courageous men and women who participated in lunch-counter sit-ins and the Birmingham march.³² He is correct that sit-ins and the like were illegal at the

27. In the book I quote Larry Alexander and Fred Schauer's observation that it would be odd to focus the study of constitutional law primarily on *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; and *Korematsu v. United States*, 323 U.S. 214 (1944). WENDEL, *supra* note 9, at 102–03. The Supreme Court has, from time to time, really stuffed it up. A lawyer seeking to understand the way courts interpret the Constitution would be advised to focus mostly on cases that continue to be debated by the Court as expressions of still-viable constitutional doctrine.

28. Luban, *supra* note 14, at 680.

29. Anthony V. Alfieri, *Fidelity to Community: A Defense of Community Lawyering*, 90 TEXAS L. REV. 635, 635–36, 652–56 (2012).

30. See Alfieri, *supra* note 29, at 4–5 (“[T]he [Historic Black Church] Program contemplated a media campaign (e.g., editorials and letters), public protest (e.g., a march, rally, or sit-in), and political pressure (e.g., reporting selected public officials to regulatory agencies for the purposes of investigating ongoing unethical or unlawful conduct in unrelated matters), all to persuade local municipal and county officials to help mobilize public opposition to the proposed closing.” (footnote omitted)).

31. Simon, *supra* note 2, at 715. Critics sometimes say I am making a fetish out of the law and legal authority—Simon's use of the word “authoritarian,” *id.* at 718, captures the flavor of this sort of objection—but it is important to emphasize that the authority of law is, in my view, ultimately grounded in the value of equality and the obligation to treat one's fellow citizens with respect. Simon thinks the fear of anarchy keeps me up at night, *id.* at 709, but the boogeyman in the closet of the book is better identified as solipsism and arrogance. I am gratified to see Simon concede that “lawyers are not routinely privileged or obliged to act on their own views on the ultimate merits of the controversies in which they are involved.” *Id.* at 711. Perhaps I have been misreading him for years, but I have always understood Simon as arguing for precisely the contrary—i.e., that lawyers either may or must consider whether the actions they take on behalf of their clients are likely to promote justice. See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 138 (1998) (“Lawyers should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice.”).

32. Simon, *supra* note 2, at 715.

time, but there is nothing wrong with a lawyer participating in civil disobedience, defending clients after the fact against charges of trespassing or disorderly conduct, or even advising clients to engage in civil disobedience, as long as the lawyer clearly states that the justice of the client's cause does not make the activity lawful. Conversely, the availability of some strategies of resistance based on legality, political legitimacy, and legal rights does not preclude the use of nonlegal strategies to accomplish the end of social justice.³³ The only inference I am concerned with blocking is the one drawn from the justice of some outcome to its legality.

Kruse perceives that I envision the law as the hero in an allegory in which society faces trouble in the form of an impasse caused by empirical uncertainty or normative pluralism.³⁴ But like my colleague Jim Henderson's feckless superhero Captain Torts,³⁵ the law sometimes either fails to rescue people from trouble or manages to make things even worse through its intervention.³⁶ Kruse agrees that the law transforms controversy, and she acknowledges that this is a good thing, but she denies that the law ever really settles anything. In the debate over same-sex marriage, for example, "the language of law continues to provide ways to formulate and package the issues in the debate," using analogies with civil rights claims raised by interracial couples to clarify the rights at stake.³⁷ This transformation is not complete, however; it is a repackaged moral debate, but the terms of the debate are still set by "reason and the public good," not merely by what is lawful.³⁸ The law merely provides additional conceptual

33. Cf. Alfieri, *supra* note 29, at 33–34 ("In the context of low-income communities of color, democratic lawyering offers race- and identity-conscious strategies of advocacy and counseling fashioned from dissenting voices traditionally outside law, legality and legitimacy [L]awyer candor, collaboration, and a race-conscious conversation best steer the normative assessment of legal-political strategies . . . and the practical consideration of alternative nonlegal tactics . . .").

34. See Kruse, *supra* note 3, at 663 ("Wendel's functional argument in a nutshell is that we should respect the law despite our moral disagreement with its content because law does for us something that we cannot do for ourselves: law rescues us from moral pluralism.").

35. One of my goals as a legal academic is to make better known the story of Captain Torts, one of the great unpublished characters in jurisprudence:

Captain Torts is a fellow about [Henderson's] size (let us simply say a large person), [who] wanders through our society seeking to protect people from the wrongs of others. Captain Torts is dressed in a baggy leotard, with a cape and a large yellow T in a circle on his chest. Whenever he hears of someone in distress, he enters the scene (usually, if possible, through a window) and attempts a rescue. Much of the time, he is a welcome addition, and helps to correct imbalances of power between persons in the society. Occasionally, . . . Captain Torts is resented by the people that he tries to help. On those occasions, the people try to push him back out the window. What all of this means, Henderson leaves to the reader.

JAMES A. HENDERSON, JR. ET AL., *THE TORTS PROCESS: TEACHER'S MANUAL* 20 (7th ed. 2007).

36. For an example of an argument that the law sometimes makes societal disagreement worse, see John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

37. Kruse, *supra* note 3, at 667–68.

38. *Id.* at 668.

resources, such as notions of rights, duties, and due process, with which to conduct this ongoing debate.³⁹ This leads Kruse to a challenging critique of my position, namely that the functional and normative arguments to respect the law should be recast as argument to respect the legal *system*. A legal system consists of much more than enacted laws to be followed—including multiple avenues for citizen participation in the process of democratic self-government. In contrast with my nightmare of intractable disagreement, Kruse posits a noble dream of law opening a space within which a plurality of moral viewpoints can thrive.⁴⁰ Society should not aim for settlement (even on a provisional basis) of moral controversy, but it should provide avenues for peaceful, constructive disagreement to thrive.

The book does attempt to account for “the complex interplay created between private compliance with (or deviance from) law and public lawmaking.”⁴¹ Drawing from the work of Lauren Edelman and Mark Suchman, Section 6.4.2 shows how employers responded to the legal definition of sexual harassment and the obligations imposed on employers to prevent a hostile work environment.⁴² Kruse is correct that the process of complying with antidiscrimination laws is not a simple, linear one of reading a law and obeying its clear directive; instead, the meaning of the laws emerged through application, as employers tried to figure out how to comply with an uncertain, shifting mandate. Law therefore enables politics rather than preempting disagreement. I do not disagree with this way of putting Kruse’s criticism if the relevant actors believe themselves to be attempting in good faith to ascertain what the law permits or requires. Respect for the law may include grudging acquiescence as well as open disobedience.⁴³ What is

39. Although controversy continues about same-sex marriage, the law does settle at least some issues. If the clerk of Tompkins County, New York, refuses to issue a marriage license that covers a same-sex union (a highly unlikely occurrence given the politics of Ithaca, but it’s a hypothetical), then one can criticize the county clerk in terms of the ethics of public office for substituting his or her own view about morality for a legal entitlement to receive a marriage license.

40. Kruse, *supra* note 3, at 670–71.

41. *Id.* at 671.

42. See WENDEL, *supra* note 9, at 203–07.

43. To be clear, I do not intend anything in the book to ground a criticism of community lawyers as abusers of the law, as Alfieri fears. Alfieri notes that “daily combat against inner-city poverty and racial inequality requires the creative enlargement of conventional lawyer roles and functions as well as the expansion of constitutional, statutory, and common law entitlements.” Alfieri, *supra* note 29, at 649. I could not agree more. There is a deep and subtle debate between some proponents of critical legal studies on the one hand, and critical race theory on the other, over whether legal rights are oppressive or empowering. Patricia Williams argues, for example, that legal rights are a way of insisting that powerful white actors recognize the dignity and power of African-Americans. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 146–66 (1991). For Williams, assertions of rights confront the denial of human needs in a way that requires acknowledgement of these needs. See *id.* at 153 (“For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of their humanity: rights imply a respect that places one in the referential range of self and others, that elevates one’s status from human body to social being.”). Although I lack Williams’s eloquence, I have tried to say something similar: progressives should not make such a totalizing critique of power imbalances in society that they call into

ruled out, however, is covert nullification or manipulation of the law. There is room in my vision of legality for lunch counter sit-ins as well as the back-and-forth between courts and employers that created the existing law of sexual harassment through an iterated process of court challenges and new mandates to employers. Legal settlement is not a one-time event. Rather, it can be a process by which actors in society orient themselves around legal rights and duties. This does not preempt nonlegal ordering, but it does make possible a distinctive kind of order in which citizens justify their actions to each other with reference to social procedures that reflect shared values of equality and dignity.

IV. Stupid Laws

It is not surprising that my reviewers have sought to embarrass the position in the book by pointing to laws that, as Pepper nicely puts it, have results that “may be perverse in relation to generally accepted values or the particular values underlying the legal provision.”⁴⁴ Pepper’s example is a prohibition on hiring undocumented workers, which prevents a working couple from hiring a child-care provider.⁴⁵ Simon imagines the discriminatory enforcement of an archaic fornication statute that criminalizes consensual sex between unmarried adults.⁴⁶ Although they put the objection more kindly, what they are really saying is, “Surely you cannot mean that *this* law is deserving of respect!” But to quote the late Leslie Nielsen’s character in *Airplane!*, “[I do mean that], and stop calling me Shirley!”⁴⁷

In Pepper’s case, the lawyer cannot tell the couple that it is legally permissible to hire the undocumented worker. Pepper envisions the lawyer giving categorical and somewhat dismissive advice: “[Y]ou can’t and shouldn’t [hire the worker]. It’s unlawful.”⁴⁸ He is right that the situation is more complex, morally speaking, than the law as written, and a lawyer is free to convey these additional subtleties to the clients in the form of moral counseling. Nevertheless, the presence of nuance and complexity in the world does not undercut the conclusion that the distinctive aspect of the role of lawyer—as opposed to others who dispense advice about morally complex

question the capacity of official institutions to recognize rights in favor of disempowered citizens against the powerful. My critics here are fond of ascribing various anxieties to me, so I will admit to worrying that treating the law instrumentally will result in a long-term impairment of its capacity to underwrite demands for respect by the powerless.

44. Pepper, *supra* note 2, at 693.

45. *Id.* at 693–94.

46. Simon, *supra* note 2, at 714.

47. The actual bit of dialogue, for those who are not children of the 70s and 80s, is:

Dr. Rumack: I won’t deceive you, Mr. Striker. We’re running out of time.

Ted Striker: Surely there must be something you can do.

Dr. Rumack: I’m doing everything I can, and stop calling me Shirley!

AIRPLANE! (Paramount Pictures 1980).

48. Pepper, *supra* note 2, at 694.

subjects—is that lawyers are responsible for ensuring that their advice conforms to the duties and permissions contained in the law. The “abstract and wooden”⁴⁹ tone of the advice given by the lawyer in Pepper’s hypothetical is the result of Pepper imagining an officious, self-righteous lawyer expressing disapproval of the client’s predicament. I have no problem whatsoever with lawyers conveying a sense that the law is misguided, out of touch with reality, or perverse, but these judgments by the lawyer do not give the lawyer license to counsel the client—even indirectly, with a wink and a nod—to ignore the law. If the client chooses to take the risk of violating the law, as long as the lawyer has not blessed or encouraged this conduct, the legal and moral blame rests with the client.⁵⁰

I also worry a bit that labeling some laws as anachronistic, foolish, or otherwise undeserving of respect reflects a certain elite condescension toward normative positions with which we (the “royal we”) disagree. Personally, I think it is idiotic that there is a criminal statute prohibiting unmarried adults from having consensual sex, but evidently, a substantial number of my fellow citizens believe that the existing antifornication statutes have got the balance just right.⁵¹ I have to recognize that my reaction to this statute reflects other beliefs I have concerning sexual morality and the appropriate scope of the criminal law that may not be universally shared, and that the law is not so crazy that no rational human being could ever endorse it. Although none of the reviewers here has misinterpreted my view as moral relativism of the kind familiar to anyone who has taught an introductory ethics class, I want to be clear and say that I believe it is *really* correct to say that there is nothing morally wrong with premarital sex, and even if there were, it would not be appropriate to criminalize it. Nevertheless, I acknowledge that others have deliberated conscientiously about this question and have reached the contrary conclusion.

V. Conclusion: My Nightmares and Noble Dreams

Luban and Kruse allude to Hart’s opposition between the nightmare of unlimited judicial discretion and the noble dream of a profession (in Hart’s case, the judiciary; as Luban suggests, lawyers in their capacity as legal

49. *Id.* at 695.

50. A lawyer who takes this stance is not a “legal cipher,” as Pepper suggests. *Id.* at 700. In my view, the propriety of moral counseling within the attorney–client relationship is an entirely contingent matter. Some clients, as a result of a long-term professional relationship characterized by trust and mutual respect, might appreciate a lawyer telling them that it would be morally wrongful to plead the statute of limitations to escape a legal obligation. Pepper is also right to note that a particular client may have business reasons for doing the decent thing notwithstanding a legal entitlement to the contrary. *Id.* at 701 & n.48. In these cases, moral counseling would be appropriate—maybe even expected by the client—but it is not a requirement of the role as such.

51. If there is truly no remaining support for the law, it may be invalid under the doctrine of desuetude. I am assuming here that the statute has been challenged on these grounds and has not been invalidated for that reason.

advisors) dedicated to a craft that contributes to social stability and solidarity.⁵² As this metaphor shows, a theory of law or legal ethics may be animated by a fear that a different approach is the road to some imagined hell. The major figures in the field of legal ethics—many of whom I am honored to have as critics in this Colloquy—seem, ironically, to be worried about an excessive tendency on the part of citizens and lawyers to obey the law. Simon exalts civil disobedience and even nullification of law,⁵³ Luban reminds us that the Milgram Experiments demonstrated that people are not particularly inclined to resist unjust authorities,⁵⁴ and even Pepper and Freedman—who have resolutely defended the standard conception against its academic critics for many years—have been concerned to provide avenues for conscientious objection by lawyers.⁵⁵ The nightmare case in the back of the minds of these theorists is the German legal profession in the Third Reich or the American legal profession in the Jim Crow South, all too willing to lend their assistance and expertise to the administration of an unjust regime by faithfully interpreting and applying positive law. The figure of the lawyer-as-Eichmann haunts many legal ethicists. Their noble dreams, on the other hand, invoke real lawyers like Louis Brandeis or fictional characters such as Atticus Finch to highlight the virtues of wisdom, discretion, and informed judgment about both morality and the law.⁵⁶ Not surprisingly, these lawyers tend to be nonconformists and mavericks, willing to disobey orders or blow the whistle if they believe the client's ends are unjust.⁵⁷

52. DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 131–32 (2007); Kruse, *supra* note 3, at 670–71. Nicola Lacey has taken this phrase as the subtitle for her biography of Hart, suggesting that the great philosopher's life was itself both of these things. NICOLA LACEY, *A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM* (2004).

53. In one of my favorite papers of his, Simon argues that portrayals of lawyers in popular culture tend to depict lawyers as praiseworthy to the extent they are willing to violate the law in service of higher moral principles. William H. Simon, *Moral Pluck: Legal Ethics in Popular Culture*, 101 COLUM. L. REV. 421, 447 (2001).

54. LUBAN, *supra* note 52, at 237–66.

55. Pepper does so in the context of moral counseling. Pepper, *supra* note 2, at 699–702. Freedman insists that lawyers must make a morally grounded choice to represent any given client and are fully morally accountable for those choices. MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* § 4.02, at 69–72 (4th ed. 2010).

56. See, e.g., Simon, *supra* note 2, at 715–16 (citing HARPER LEE, *TO KILL A MOCKINGBIRD* 312–18 (40th Anniversary ed. 1999) (noting that Atticus Finch agreed with the sheriff to conceal evidence of Boo Radley's involvement in the death of Bob Ewell); SIMON, *supra* note 31, at 127–35 (citing approvingly the ethics of Brandeis, who while a lawyer in private practice sought to dissuade powerful clients from engaging in antisocial projects).

57. Cf. Alice Woolley & W. Bradley Wendel, *Legal Ethics and Moral Character*, 23 GEO. J. LEGAL ETHICS 1065, 1067 (2010) (arguing, *inter alia*, that the types of lawyers picked out as admirable by many theories of legal ethics would actually be dysfunctional in institutional practice settings).

My nightmare is set in a world in which not all lawyers possess the rectitude and trustworthiness of Brandeis and Finch but are just as keen to act as moral free agents. The fear is not really anarchy, as Simon believes,⁵⁸ but the abuse of power. The figure that haunts my dreams is that of John Yoo, presenting his “legal” advice with a straight face to the President, informing him that the law authorizes waterboarding, or of the in-house and retained lawyers for Enron who authorized the transactions that eventually toppled the company. In my dreams the lawyers do not believe themselves to be acting wrongly; rather, they think they are respecting the ethical principle of zealous advocacy. Never mind that they are counseling clients or structuring transactions, not acting as advocates—they believe themselves to be ethically permitted to rely on strained, distorted, and implausible (or, stated more positively, creative and aggressive) interpretations of law to advance their clients’ ends. Even worse, they may believe themselves to be doing something morally praiseworthy because it is in the public interest. John Yoo, for example, clearly sees himself as a hero and a patriot for doing whatever was necessary to protect the American people from terrorism.⁵⁹

My noble dream is not a lawyer of extraordinary wisdom and discretion but merely a regular person who balks at bending the law out of shape to permit her client to do something. In a basically just society, lawyers perform a valuable function, but it is one different from that performed by members of the clergy, psychotherapists, writers, political leaders, activists, community organizers, and citizen protesters. The role of lawyers is more technocratic but no less noble. Bureaucrats like Eichmann can be the instruments of monstrous evil, and the Third Reich could not have functioned without the willing assistance of people just doing their jobs. But the rule of law can be a great good too, and it also cannot exist without people doing their jobs.

Within a moderately decent society, the ethics of lawyers *acting as lawyers* has to be oriented toward the law, not morality or justice. If lawyers wish to be activists or dissidents, they can be, but it is essential that they not confuse these very different social roles. I am not blind to the injustices that remain in the United States, but the *legal* response to these injustices should not be individual acts of sabotage or nullification. Lawyers can and should advocate for change, but as always, it should be zealous advocacy within the bounds of the law.⁶⁰ One of the principal aims of this book was to restore the

58. Simon, *supra* note 2, 709.

59. See generally JOHN YOO, *WAR BY OTHER MEANS* (2006).

60. See MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980) (“A lawyer should represent a client zealously within the bounds of the law.”). The notion of zeal survives in the modern disciplinary rules only in a few comments. See MODEL RULES OF PROF'L CONDUCT pmb. ¶ 2 (2009) (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”); *id.* R. 1.3 cmt. 1 (“A lawyer must also act with . . . zeal in advocacy upon the client’s behalf.”). Nevertheless, the *Model Code* formulation has remained influential and is quoted tirelessly by lawyers as a concise summary of their ethical obligations.

last part of the lawyer's mantra just stated to its proper place in legal ethics. Without the constitutive obligation of fidelity to law, lawyers are just sophists—offering nothing beyond the kind of half-baked moral advice that any decent client could supply for herself. If there is something distinctive about our profession, it has to be a commitment to the value of legality and a corresponding obligation to respect the law.